

The Exploratory Study on Prevention of illegal Medical Advertisement in Healthcare Market

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Abstract

It is natural that the medical advertisement should be guaranteed as part of the basic commercial activities of medical institutions. However, the general public are non-specialist and they have less informed about medical care than medical specialists, and it is not easy to judge and select medical information. Also, if someone damaged by illegal medical advertising, it cannot be recovered to the original. In this regard, medical advertising has been legislated so that medical organizations can pre-screen the medical laws. However, In December 2015, after the Constitutional Court ruled unconstitutional preliminary censorship, it became virtually impossible to pre-screen. In recent years, illegal medical advertisement have been on the rise, and false and exaggerated medical advertising are increasing the damage to medical consumers. Therefore it is urgent to take countermeasures about this. Thus, this paper try to analyzes the characteristics of general commercial and other medical advertisements and looks for alternatives that can minimize the damage caused by illegal medical advertisements and institutional weaknesses by analyzing the regulatory trends in medical advertising.

▶Keyword: Health Policy, Healthcare Market, illegal Medical Advertisement

I . Introduction

Advertising is generally a means of facilitating a company to advertise its products to its customers and to encourage its customers to purchase their products. And it is a kind of important marketing technique that is directly connected with the survival of the enterprise. The ultimate goal of advertising is to provide potential customers, including current customers, with information about their products and persuade them to take a friendly attitude, ultimately leading to the purchase of their products. In addition, the advertisement has a strategy to maximize the profit of the company by enhancing the corporate image through the non-face-to-face expression to product or service and stimulating the desire of the

customer. Therefore, it is more likely to highlight advantages rather than disadvantages of products.

In the recent medical market, competition is expected to become more and more intensified in the mainstream of medical institutions' enlargement, specialization, openness, and commercialization. The medical marketing using medical advertisements is continuously increasing as a strategy to survive in this endless competition. The advertising tends to maximize the benefit of advertisers. Therefore, it is very likely that they will highlight the benefits of medical services in medical advertising. Since medical treatment is directly linked to human life, disadvantages such as side effects rather than the merits

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of medical services also must be important factors of consumers' judgment. Medical care has strong publicity because it is closely related to the health and life of the people. Therefore, unlike general advertisement emphasizing profitability, medical advertisement is strictly regulated, and medical regulations such as prohibition of medical advertisement and preliminary inspection are being legislated. Generally, if medical institutions want to medical advertise, it is required to pre-screen the suitability of the medical advertisement to the medical group etc. However, on December 23, 2015, the Constitutional Court banned medical advertising that were not subject to prior deliberation. And to some regulations on the medical law which is violated get the penalties, the Constitutional Court ruled that is unconstitutionality because it was a prior censorship prohibited by the Constitution [1]. The preliminary deliberation system of medical advertisements has been stipulated in order to secure the publicans of medical care and to protect the people's right to health and excessive competition of medical institutions. However, the illegal medical advertisements are increasing rapidly after the decision of the Constitutional Court. Therefore, it getting formed to a great social problem.

According to a recent Consumer Citizen Group, after analyzing the 343 cases of Internet, social network service (SNS) and mobile medical advertisements from February to April, The number of illegal medical advertisements corresponding to 'Consumer Dazzlement' was the highest at 72.9% of 343 cases. In addition, there is a growing awareness that resumption of preliminary deliberation should be resumed [2].

It is natural that the medical advertisement should be guaranteed as part of the basic commercial activities of medical institutions. However, the general public is less able to understand and select medical information than do medical professionals. In addition, the damage caused by illegal medical advertisement has a close relation with the life of the people. Therefore, it is urgent to take countermeasures to prevent illegal medical advertisements overflowing and minimize damage to medical consumers.

The purpose of this paper is to propose a solution that minimizes the damages of medical consumer due to the false and exaggerated advertising in the constant flood of medical advertisement.

II. Theoretical Background

1. Concept of Medical Advertising

There is no clear definition of medical advertisement in medical law. However, in terms of the influence of the advertisement on the general public, the medical advertisement, which should generally consider the publicity, is different from the general commercial advertisement, which is generally aimed at for profit[3].

Therefore, defining the medical advertisement by writer can be defined as "medical advertisement have to guarantees citizens' right to health and knowing about health care and the right of self-determination of good quality health care service". Of course, in terms of the Act of Allurement for patients, the medical advertising has commercial aspects. Therefore, if the medical advertisement becomes a commercial advertisement that focuses on attracting the patient, it becomes an advertisement ignoring the public nature of medical advertising. And if patients believe and choose the illegal false or exaggerated advertisement and they damaged, it will result in irreparable physical and mental harm. Therefore, compare with general advertisement, medical advertisement has different public interest tendency.

2. Characteristics of the Medical Service Environment

2.1 A Monopoly of Medical Services

Everyone should be guaranteed freedom of choice the job in the constitution. However, in order to be a medical practitioner, you must complete the prescribed education at the university, and only those who passed the national examination administered by the government can get the special right that opening a medical institution. In this regard, the market for medical services has a monopoly status given only to medical personnel. In addition, the supply of medical personnel is decided by the government in consideration of the medical service markets' environment, and the government decides how to provide medical services.

The people who is a medical consumer wants to get the best medical services. The government induce to receive medical treatment from primary medical institution. In other words, to allocate resources efficiently, the government intervene in the supply side of the health care market. The price for medical services, that is, the price also determined by the government [4]. Considering the publicity aspect of medical

care, the government implements the national health insurance, and the government decides the pricing of medical services, not the autonomy of the market. And through the strengthen the publicity of people, the scope of health care services is also virtually government-led. Therefore, the government is strongly regulating and controlling the medical service market itself, and it has the indispensable public characteristic to guarantee the health rights and the right to life of the people.

2.2 Asymmetry of Medical Information

The healthcare market has the following characteristics. First, consumers do not fully understand the information about healthcare services. Unlike general products and services, medical services are very difficult to understand to normal people, because the content is very specialized, also the terms are technical term[5]. As a result, the consumer of the medical service has a characteristic that the choice of the medical service corresponding to him is highly dependent on the information provided by the medical service provider. Since medical care is a professional field, there is a limit to general consumers' understanding of medical information completely, and there are limits to consumers making rational choice due to their limitations.

2.3 Non-Uniformity of Medical Service Quality

The quality of medical care provided by medical personnel cannot be standardized and cannot be equalized. In addition, the services provided by healthcare providers are not uniform in quality of service as standardized products, and the treatment methods and experiences experienced by each healthcare provider are not the same[6], and the quality of medical services accordingly is not equal. Therefore, consumers have difficulty in judging medical quality without providing sufficient information. In addition, the general public has a characteristic of experience goods which is unknown until the quality of medical service is examined. Therefore, there is a limit to the evaluation, and if information about medical service quality is provided false or deceptive in medical advertisement, serious consumer problems may be caused.

3. Promotional Characteristic of Medical Advertisement

Demand for health care services is highly influenced by

recommendation by acquaintances such as oral reputation and friends. Therefore, it may happen that oral or reputational contents are claimed in the advertisement without objective criteria or scientific basis. In the medical services market, consumers cannot cancel or reverse the selection after a purchase decision. Once consumers receive medical treatment, they cannot return to the previous state. This means that the consumer damage caused by illegal medical advertisements can be very serious[7].

III. Constitutional Court of Illegal Medical Advertising

1. Recent Constitutional Court Decision on Medical Advertisement[8]

1.1 Factual relationship

Claimant A is a doctor who operates a hospital, and Claimant B is a person who sells advertising and medical devices. When a practitioner, institutions, and person want to medical advertise by using media prescribed in the Medical Law, preliminary review about content and method of advertising from the Minister of Health and Welfare are needed. However, from September 24, 2013. to September 27, 2013., they plot and installed the banner with the words "latest incontinence surgery method, IOT, simple procedure, low cost, no side effects" on the wall of the front of the building which is operated by Claimant A. And they did not receive any preliminary review from the Minister of Health and Welfare. So, they received the Summary Order(Daejeon District Court 2013 GoYak 15224).

To this Summary Order, claimants claimed a formal trial(Daejeon District Court 2014GoJeong206) and during the trial, they claimed for the Constitutional Law Judgment Enactment Request(Daejeon District Court 2014 ChoGi 359) for Medical Law Article 56 Paragraph 1 and 2 No. 9. However, the court dismissed it on February 12, 2015, and it convicted the applicant. About this, On February 24, 2015. The claimants claimed the Adjudication on a Constitutional Complaint for above Article and Paragraph, also on April 22, 2015 and May 5, 2015, they submitting the documents for change of request purpose and reason. And they add subject of judgment for same Act Article 56, Paragraph 4 No. 2, Paragraph 5, Article 57, and Article 58.

1.2 Subject Provision

Medical Law (January 30, 2009, it was amended as Law No. 9386)

Article 56 (Prohibition of medical advertisement, etc.)

② the medical corporation • medical institution or a medical person cannot perform medical advertisement corresponding to any of the following items.

9. The Advertising Medical Law which is not received the deliberation pursuant to Article 57, or the contents different from receiving the deliberation.(July 23, 2010, it was amended as Law No. 10387)

Any person who violates the following provisions shall be punished by imprisonment for not more than one year or a fine not exceeding five million won : Article 89 (Penalty) Article 15 Paragraph 1, Article 17 Paragraph 1 • Paragraph 2(excluding the condition of Paragraph 1 latter part and the condition of Paragraph 2), from Article 56 Paragraph 1 to Paragraph 4, Article 57 Paragraph 1, Article 58-6 Paragraph 2.

1.3 Ruled Details

In relation to the matters of the judgment of this case, the Constitutional Court has stated that, "Prohibit the medical advertising that has not been subject to prior deliberation and among the Medical law details(amended by Law No. 9386 of January 30, 2009), the part 'Advertisement which is not subject to deliberation pursuant to Article 57' from Article 56 Paragraph 2 No 9 and the Medical law(amended by Law No. 10387 of July 23, 2010) Among Article 89, the Article 56 Paragraph 2 No 9, the part about 'Advertisement which is not subject to deliberation pursuant to Article 57' are the violation of the principle of prohibition of prior censorship".

1.4 Judgment Summary

The Constitutional Court has stated in its content that "the Constitution does not have the regulation for permission of the exceptional censorship of certain expressions. And in this situation, in the expression that is protected by the freedom of press and publication according to the characteristics of expression or the necessity of regulation, if the areas where the application of the pre-censorship prohibition principle is excluded were set apart separately, and considering the objectivity of the standard cannot be guaranteed, the pre-censorship on the Constitution, the pre-censorship on the Constitution it should be regarded as prohibited without

exception. Therefore medical advertising is also subject to the principle of pre-censorship prohibition. " In addition, it was judged that "the preliminary deliberations of medical advertisements are performed by the each medical associations commissioned by the Minister of Health and Welfare, However, the fact that the Minister of Health and Welfare, who is the subject of the preliminary deliberation, can withdraw the referral at any time and directly supervise the medical advertisement, and the enforcement decree of the medical Law directly regulates the composition of the deliberation committee, In addition, The head of review and rating board should report the results of deliberation and review to the Minister of Health and Welfare, and the matters related to deliberation standards and procedures are specified by the Presidential Decree. Synthesize above, it is difficult to see that each doctor association is independent and autonomous to conduct preliminary deliberation work away from the influence of the executive power. Therefore, the legal provisions of the case are against the principle of prohibition of prior censorship."

2. Implications of the Ruling

Due to the ruling of the above Constitutional Court, the preliminary deliberation on medical advertisement became unnecessary. As a result, illegal medical advertisements have begun to take root in recent years, and some have suggested that the pre-screening system should be reintroduced again. In addition, there are opinions that it is necessary to censor through the self-deliberation agency, but it is doubtful how effective this censorship actually is. Therefore, the most desirable solutions to this problem are as follows.

IV. Solution for Prevention of illegal Medical Advertisement

1. Strengthening Method the Ethics of Medical Personnel

Medical professionals need strong ethical and accountability other than general occupations in terms of protecting the lives and health of the people. Unlike other occupations, medical personnel have a different status from other occupations in that they only have to complete

the required education at university and only those who have obtained the national license test qualify. At is, this job requires good faith, ethics, and public accountability are more important than other jobs. Of course, it is a matter of course that medical staff should have at least a sense of profitability[9]. For this purpose, commercial activities through medical advertisements should be guaranteed. However, for the purpose of profit only and if the focus is on the incentive of the patient without the precise explanation of the side effects of medical treatment, the advertisement is highly likely to be an unfair advertisement or exaggerated advertisement. Since patients have an asymmetric basic structure that lacks expertise in medicine compared to medical practitioners, medical advertisements aimed solely for the benefit of a medical person are highly likely to infringe the choice and choice right of the medical consumer. Therefore, medical ethics courses should be designated as essential courses at health universities and medical schools so that ethics of medical practitioners can be strengthened. In addition, the regulations of each medical treatment association (medical association, etc.) should be strengthened by establishing a regulation that can prohibit unethical activities including false and exaggerated advertisement so that there is no damage caused by medical advertisement.

2. Introduction of Certification System of Medical Advertising Companies

Medical advertising contains the most character of delegation contract among typical contracts in civil law. As a result, advertisers who are in charge of delegation work from the medical practitioner have to keep the Prudent Person Rule to doing this work. Therefore, an advertiser who has the Prudent Person Rule have to perform the delegation work with keeping the Prudent Person Rule following instructions of the medical practitioner. In general, most advertisers complete their tasks by leading all the tasks. Therefore, if the advertiser makes an excessive advertisement to enhance the effectiveness of the advertisement against the intention of the medical person, the legal liability of the Prudent Person Rule in the civil law may be a problem. For these violation of obligations, on Civil code the advertiser liable for tort liability or default of obligation. However, these tort liability or default of obligation are just only the final means of relief. Therefore, prior to this, it is necessary to

take preventive measures to prevent illegal advertisements in advance. Therefore, advertisers who want to deal with medical advertisements should be obliged to take basic literacy education and ethics education beforehand, and in this regard, institutionalization of the medical advertiser certification through the government-led Ministry of Health and Welfare or the medical association, it can be an alternative to prevent the damage of medical consumers by securing the professionalism of medical advertisements.

3. Enhanced Monitoring by Private Organizations

The paparazzi system should be implemented so that consumer groups can continuously receive cases for the illegal medical advertisement damages and accuse them, and civil organizations also should supplement the system so that illegal medical advertisements can be monitored and checked. Thus, when including medical advertisements to other report reward system and combined with general citizen surveillance and checks, the damage to illegal medical advertisements will be minimized and also it can be a preventive measure.

4. The Method of Government-led Medical Advertisement Regulation

Due to the substantive intervention of the government, medical advertising became impossible to pre-screen under the supervision of the medical association. Therefore, countermeasures are needed. In other words, whether medical organizations should voluntarily pre or post-medical advertisements without government intervention, or the government cannot pre-regulate, so, medical organizations will do post-regulation. About this, the medical organizations shall be decided whether or not to do so. However, the formation of a voluntary deliberation agency cannot guarantee effectiveness. In addition, the voluntary deliberation of each medical organization has the effectiveness to moral and ethical part but to the regulatory part is ineffective. And it is highly likely to be a deliberation on the way of self-protection. Therefore, apart from the voluntary deliberation agency of medical organizations, thorough monitoring and guidance under government initiative, this can be a way to minimize the damage of illegal medical advertisements.

V. Conclusion

As the medical personnel are also professionals, so it is impossible to unconditionally regulate medical advertisements because freedom of expression and profession must be guaranteed. In addition, medical advertising is a necessary marketing means to survive in the competition of survival among growing medical institutions[10]. However, the general public is less informed and informed about medical care than medical specialists, and it is not easy to judge and select medical information. Also, if someone damaged by illegal medical advertising, it cannot be recovered to the original. Also, it is not possible to treat the commercial advertisement with the strong commercial nature and the medical advertisement with the strong public interest equally. Therefore, it is necessary to regulate the medical advertisement so as not to damage the publicity while guaranteeing medical advertisement. Now, it is impossible to pre-screen medical advertising, so countermeasures are needed. In addition, there is a limitation in that the government autonomously regulates only medical organizations about medical advertisements. Therefore, government-led post regulation should be strengthened by establishing a special agency about medical advertising under the Ministry of Health and Welfare. In addition, the medical law should be strengthened by a license suspension and correction order so as not to cause damage to the public caused by illegal medical advertisements.

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